CONSERVATION LAW FOUNDATION

October 7, 2008

Philip Giudice, Commissioner
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: Reply Comments – RPS Import Feasibility

Dear Commissioner Giudice:

The Conservation Law Foundation (CLF) appreciates this opportunity to submit reply comments in connection with DOER's assessment of the feasibility of instituting capacity and "netting" requirements as conditions for Massachusetts RPS eligibility for electricity imported into the ISO-NE control area from renewable generators located in control areas outside of and adjacent to ISO-NE, pursuant to Section 105 of the "Green Communities Act." Particularly given the very short time period for filing reply comments to the extensive initial comments filed on October 1, these comments do not set out to respond to every issue and argument that stakeholders have endeavored to raise. Rather, these comments are intended to address central arguments raised by the three commenting parties who are proponents of the capacity and netting restrictions.[1]

1. DOER's feasibility inquiry should not inappropriately be constrained.

Proponents of the import restrictions attempt to inappropriately constrain the scope of DOER's present feasibility inquiry. As agreed by the proponents, "feasibility" should be taken by its plain meaning. See, e.g., Ridgewood Comments at p. 3.[2] However, contrary to this basic principle of statutory construction, proponents then go on to argue generally that DOER's inquiry into the "feasibility" of the capacity and netting requirements for imported renewable energy should be limited solely to a consideration of whether the restrictions can be carried out, without any regard to economic, legal, public policy or other feasibility considerations. They do not supply any valid justification for so limiting the scope of DOER's inquiry – nor can they. Moreover, the proponents at least implicitly admit that the plain meaning of feasibility is significantly broader than the narrow construction they seek to apply. For example, Ridgewood

[1] Specifically, the proponents are Ridgewood Renewable Power ("Ridgewood"), Cape Wind Associates ("CWA") and the Bay State Hydropower Association ("BSHA").

[2] Proponents nonetheless proffer numerous suggestions regarding the supposed intentions and determinations of the Massachusetts Legislature which are not evidenced by the Green Communities Act and should not form the basis for DOER's determinations here.

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cites California Environmental Quality Act (CEQA) guidelines and emphasizes that "feasible" is there defined to include considerations of "*time, economic, environmental, legal, social and technological factors*," id. at p. 3 (emphasis in original) – yet Ridgewood seeks to exclude virtually all of these considerations here. See also, CWA comments at f.n.1 (urging the Department "to *limit* its consideration to the *practical* feasibility of Section 105").

As set forth in CLF's initial comments dated October 1, the plain meaning of the term "feasible" includes not just whether something is "capable of being done or carried out," but also whether it is "suitable" or "practicable." Particularly in the extraordinary circumstance here where the relevant law expressly directs the agency to make a threshold feasibility determination (and predicates any application of the statutory provisions on an affirmative determination by the agency), DOER should take into account all significant issues that have been raised with respect to feasibility – including issues going to the *legal* infeasibility of the provisions.

While proponents suggest that it is not DOER's prerogative to determine the constitutionality of the capacity and netting requirements – i.e., the *legal* feasibility – Section 105 sets forth no such limitations on the requisite feasibility study that would preclude constitutionality considerations. Further, even if it were inappropriate for an agency to undertake a constitutionality review, *sua sponte*, of a statute it is charged with implementing, there exists no such prohibition in this instance. Here, in the wake of serious questions having been raised during the legislative process about practical, economic and legal feasibility, the statute itself calls for analysis as to whether certain provisions are at all feasible to adopt or implement. Moreover, even if DOER were somehow constrained from making an ultimate determination that the capacity and netting restrictions are unconstitutional, analysis of conflict with the Commerce Clause and NAFTA is still relevant in that the vulnerability of the provisions to legal challenge is likely to create conditions of market uncertainty that undermine the benefits of the RPS.

2. The stakeholder comments support a conclusion that the capacity and netting requirements are legally infeasible because they run afoul of the Commerce Clause.

Proponents of the capacity and netting requirements similarly are off the mark in attempting to justify these restrictions as somehow being consistent with the Commerce Clause. Having acknowledged that the capacity and netting requirements would only apply to renewable energy generators outside of Massachusetts (in control areas adjacent to the ISO-NE Control Area), proponents fail to point to a legitimate state interest that can only be served through these restrictions. Moreover, discriminatory treatment cannot be justified by perceived inequities in the policies of other jurisdictions.[3]

There is no dispute that Green Communities Act Sections 105(c) and (e) would impose conditions on RPS eligibility for renewable energy imported from control areas adjacent to ISO-

[3] CWA cites no authority to support the proposition that discriminatory treatment by one state somehow justifies discrimination by another. And indeed, the U.S. Supreme Court has rejected such a proposition. Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 379-80 (1976); Sporhase v. Nebraska, 458 U.S. 941 (1986). Even if other jurisdictions were in fact discriminating against renewable energy from Massachusetts, the appropriate remedy would be to bring a Commerce Clause challenge in Court; there is no such justification for enacting a "reciprocal" barrier that discriminates against interstate commerce. Id.

New England that would not apply to renewable energy generated within the ISO-New England Control Area. As admitted by Ridgewood, "the real root of the Commerce Clause issue is that Section 105 [of the Green Communities Act] imposes obligations upon external resources that are not similarly imposed on internal resources." Ridgewood comments at p. 8. CWA likewise acknowledges (but urges DOER not to consider) the "commercial disadvantage that might result" from the proposed restrictions. CWA at p. 3.

Contrary to what is argued by proponents, it is of no consequence that the "capacity" and "netting" conditions would discriminate only against renewable energy generators located outside of the ISO-New England control area rather than drawing a line directly at the Massachustts border. The relevant inquiry is whether the statute discriminates against *some* out-of–state companies. Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 349-51 (1977). In Hunt, the U.S. Supreme Court struck down a North Carolina state statute that was neutral on its face but impaired the ability of growers in some states, but not others, to compete against local North Carolina growers. Id. Following the Supreme Court's reasoning in Hunt, it is unavailing here to argue that the capacity and netting requirements would pose a burden only to states outside of the ISO-NE Control Area but not to the New England states.

It is also not reasonably disputed that the capacity and netting requirements would at a minimum impose economic and other burdens on renewable energy generation in adjacent control areas.[4] Even proponents of the restrictions agree that the capacity requirement would at least entail additional administrative and other burdens, if the requirements could be met at all (given the status of the FCM auctions, the rules applicable to variable output resources, etc.). With respect to the netting requirement, Ridgewood admits that it would be "extremely difficult, if not impossible" to track affiliates' trading as set forth in the proposed netting requirement, and that enforcement would be "difficult" at best. Ridgewood comments at pp. 6-7.[5]

As discussed in CLF's initial comments, where – as here – a state statute is facially discriminatory against interstate commerce, a "virtually per se rule of invalidity" applies,[6] and such statutes are "routinely struck down." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988). The presumption of unconstitutionality can only be rebutted if the state can demonstrate that the discriminatory measure advances a "legitimate local purpose" that cannot be "adequately served by reasonable non-discriminatory alternatives. " Oregon Waste Sys. Inc. v. Dept. of Envtl. Quality of Oregon, 511 U.S. 93, 100 (1994); Wyoming v. Oklahoma, 502 U.S. 437; New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). Here, as discussed below, no such legitimate local purpose has been shown and the requirements must accordingly be rejected as unconstitutional and legally infeasible.

[4] The BSHA argues that the capacity and netting requirements could be met, but nonetheless admits that additional administrative and other burdens would be created for external resources.
[5] Ample evidence has been supplied by a number of stakeholders demonstrating that the netting requirement is practically infeasible (in addition to being legally infeasible, for the reasons discussed above).
[6] Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992)(quoting Philadelphia v. New Jersey, 437 U.S. at 624).

The capacity and netting requirements under consideration are not justified by a legitimate state purpose that cannot be served by other, non-discriminatory means.

Proponents seek to advance two principal arguments in favor of finding that the capacity requirement is intended to advance a legitimate state purpose (a purpose that is not evident from the face of the Green Communities Act). First, Ridgewood argues that a capacity commitment requirement for renewable energy generation from adjacent control areas is necessary to "level the playing field." While Ridgewood goes on to argue that internal resources provide capacity benefits not supplied by external resources, Ridgewood admits that behind-the-meter generation and "other small generators" within the ISO-NE control area are not required to participate in the capacity market (and many in fact are not participating or cannot participate). So it is difficult to see how the playing field would be leveled through the imposition of a capacity requirement on *all* external renewable energy resources seeking RPS qualification when no such requirement applies to *all* renewable energy generation within the ISO-NE Control Area. Ridgewood also argues that it is somehow inequitable for external resources to sell at the same REC price as internal resources that are participating in the capacity market – but ignores the fact that ratepayers pay *separately* for the capacity commitment, which is not folded into the REC price. In addition, resources within the ISO-NE control area have the liberty to de-list (and thus stay out of the capacity market) while continuing to sell Massachusetts RECs. If the capacity requirement were adopted for external resources, they would have no such flexibility. The argument that the import restrictions are necessary to "level the playing field" must therefore be rejected.

CWA, for its part, suggests that the proposed capacity requirement is justified by the "objective of responding to a reliability threat." However, even if Section 105(c) were motivated by such an interest, the cited concern is expected to be addressed by the newly established ISO-NE Forward Capacity Market ("FCM"). The FCM – which is intended to promote reliability through new market mechanisms in *lieu* of the flawed old system of "Reliability Must Run (RMR)" contracts – is off to a promising start, with a first auction that was over-subscribed and a significant show of interest for subsequent auctions. Further, impediments to imported renewable energy generation are likely to reduce, not increase, reliability – because without reasonable access to RPS markets, external renewable energy generation is less likely to be built to serve Massachusetts. *See, e.g.,* the October 1, 2008 comments of Énergie NB Power. Thus, proponents' argument regarding the need for renewable energy to counterbalance the region's dependence on natural gas only underscores the point that it is counterproductive – including from a reliability perspective – to impose barriers to market access for clean renewable energy.

Proponents argue that a netting requirement is needed to support the purpose of avoiding "greenwashing," but they admit – as they must – that there is no evidence of such practices actually occurring in this region. *See e.g.,* Ridgewood comments at p. 2; CWA comments at 13. Ridgewood also admits the Massachusetts RPS is one of the most successful in the nation.[7]

[7] Ridgewood incomprehensibly argues that the "netting" requirements should be designed around whether, when, how and to what extent any greenwashing may be occurring, yet admits that there is no evidence of such greenwashing to compel the implementation of, or inform the design of, such rules. Ridgewood Comments at 6.

None of the proponents have demonstrated the existence of a legitimate state interest in imposing discriminatory netting restrictions that would go beyond the existing rules pertaining to RPS qualification for renewable energy generated in a control area adjacent to ISO-NE. The existing rules have not been shown to be inadequate to protect against speculative risks.

In short, there has been no demonstration of a legislative state interest to somehow justify the discriminatory capacity and netting requirements – the burdens of which are discussed in CLF's October 1 comments, in addition to comments of several other stakeholders. Nor have proponents pointed to any case law that would compel a different analysis or result.

Grant's Dairy–Maine LLC v. Comm. of Maine Dept. of Agr., Food & Rural Resources, 232 F. 3d 8 (1st Cir. 2000), cited by proponents, is easily distinguishable. First, the Court in Grant's Dairy found that Maine's minimum price requirement for locally produced milk "treats in-state and out-of-state economic interests evenhandedly." Id. at 21. The Court in that case also found that the challenged Maine statute "does not advantage Maine handlers at the expense of out-of-state handlers," id., unlike the circumstances here. The Court went on to highlight the extraordinary vulnerability to constitutional challenges faced by truly discriminatory state statutes, noting that "[t]he courts have invalidated state statutes that overtly discriminate against interstate commerce with a regularity that borders on the monotonous." Id. at 20.

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), is also inapposite. In Hughes, the Supreme Court upheld a Maryland state statute that established a "bounty" (as part of a complex scheme also involving penalties) for the destruction of vehicles titled in Maryland. The challenged statute extended the bounty to "automobile hulk processors" both within and outside Maryland, but different documentation was required to be supplied by those located outside Maryland than by those within.[8] Importantly, the Court in Hughes cautioned that its ruling upholding the Maryland statute was predicated on the particular facts of that case, specifically noting that the bounty in question was supported by direct state funding rather than private market forces. Id. at f.n. 18. Indeed, arguments made in reliance on Hughes, similar to those advanced by proponents here, were flatly rejected by the U.S. Supreme Court in New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 277 (1988). In New Energy Co., the Supreme Court pointed out that the state statute challenged in Hughes was proprietary as opposed to regulatory; a subsidy that is not proprietary in nature would not be subject to the "market participant" exception recognized by Hughes. Id. Accordingly here, where the RPS incentive in question is *not* proprietary – i.e., it is privately funded by ratepayers rather than by the state, the state enjoys no "market participant" protection that otherwise might allow it to favor in-state interests.

Finally, Meekins v. City of New York, 524 F.Supp. 2d 402 (S.D.N.Y. 2007) is also distinguishable. In Meekins, the District Court for the Southern District of New York upheld a Special Vehicle Permit program that was discriminatory against non-residents but supported by "compelling reasons for favoring those who live, work, or attend school in New York City over those who do not," including the acute shortage of available parking spaces and the level of need

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Ridgewood also notably argues that the legislature intended something much more limited in scope than the actual netting language, id., thus admitting that the netting requirements are at a minimum too broad.

[8] Unlike the statute at issue in Hughes, the capacity and netting requirements here would impose substantive burdens, not just different documentation requirements.

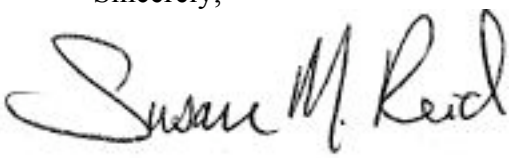
by residents as compared to non-residents. Id. at 411. Unlike the circumstances here, the challenged permit program in Meekins was supported by a legitimate local interest that could not be met through reasonable non-discriminatory alternatives.

Conclusion:

In light of the foregoing, CLF respectfully asks the Department to find that subsections (c)(3) and (e) of Section 105 of the Green Communities Act are legally infeasible and to refrain from adopting any capacity market or "netting" requirements that would serve as barriers to imports of clean renewable energy. Alternative affirmative and non-discriminatory tools for promoting the development of renewable energy to supply Massachusetts customers to meet the RPS target of 15% new renewable energy by 2020 – including long-term contracts and reasonable renewable energy facility siting reforms – should be deployed in *lieu* of questionable protectionist measures.

Thank you for the opportunity to provide these comments.

Sincerely,



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